

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

LARRY J. SIMMONS)	
Claimant)	
VS.)	
)	Docket No. 186,887
SIM PARK GOLF COURSE)	
Respondent)	
AND)	
)	
NORTHWESTERN NATIONAL CASUALTY)	
Insurance Carrier)	
AND)	
)	
WORKERS COMPENSATION FUND)	

ORDER

The Workers Compensation Fund requested review of the Order and Order Nunc Pro Tunc dated July 18, 1996, and July 22, 1996, respectively, entered by Special Administrative Law Judge Michael Harris. The Appeals Board heard oral argument on January 16, 1997.

APPEARANCES

Darla J. Lilley of Wichita, Kansas, appeared for the claimant. James A. Cline of Wichita, Kansas, appeared for the respondent and its insurance carrier. E. Thomas Pyle, III of Hutchinson, Kansas, appeared for the Workers Compensation Fund.

ISSUES

The Special Administrative Law Judge denied claimant's application for penalties but awarded claimant's attorney \$500 for attorney fees to be paid by the Workers Compensation Fund (Fund). The Fund requested this review. The only issue now before the Appeals Board is whether the Special Administrative Law Judge had the authority to assess the attorney fees against the Fund.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

The Order and Order Nunc Pro Tunc should be affirmed.

The facts are not disputed. On March 29, 1996, the Appeals Board entered an Order awarding claimant permanent partial disability benefits. The Workers Compensation Fund was responsible for the entire award. On May 9, 1996, the claimant demanded payment of the benefits awarded. Payment was not made and claimant proceeded to hearing to request penalties for nonpayment pursuant to K.S.A. 44-512a. Although the Special Administrative Law Judge denied claimant's request for penalties, the Judge ordered the Fund to pay claimant's attorney fees in the sum of \$500 for services rendered post-award.

The Fund argues that the Special Administrative Law Judge could not assess attorney fees against it under K.S.A. 44-512a. For reasons other than the Fund suggests, the Appeals Board agrees with that conclusion. By its specific wording, the only time attorney fees may be awarded under K.S.A. 44-512a is when services are rendered in a collection action instituted in District Court.

The Appeals Board finds claimant's entitlement to attorney fees in this post-award matter is governed by K.S.A. 44-536(g) which provides:

"In the event any attorney renders services to an employee or the employee's dependents, **subsequent to the ultimate disposition of the initial and original claim**, and in connection with an application for review and modification, a hearing for additional medical benefits, **or otherwise**, such attorney shall be entitled to reasonable attorney fees for such services, in addition to attorney fees received or which the attorney is entitled to receive by contract in connection with the original claim, and such attorney fees shall be awarded by the director on the basis of the reasonable and customary charges in the locality for such services and not on a contingent fee basis. If the services rendered under this subsection by an attorney result in an additional award of compensation, the attorney fees shall be paid

from such amounts of compensation. If such services involve no additional award of compensation, the director shall fix the proper amount of such attorney's fees in accordance with this subsection and such fees shall be paid by the employer or the workers compensation fund, if the fund is liable for compensation pursuant to K.S.A. 44-567 and amendments thereto, to the extent of the liability of the fund." (Emphasis added.)

The Fund contends the Special Administrative Law Judge did not have the authority to assess the attorney fees against it. First, because the Fund has appealed the Appeals Board's March 29, 1996, Order to the Court of Appeals, the Fund argues that this proceeding is not "subsequent to the ultimate disposition of the initial and original claim" as that phrase is used in K.S.A. 44-536(g). Secondly, the Fund argues that the only time fees can be awarded claimant's attorney under K.S.A. 44-536(g) is when the post-award proceeding is either for review and modification or for additional medical benefits.

After carefully considering the Fund's arguments concerning K.S.A. 44-536(g), the Appeals Board finds that the Special Administrative Law Judge properly assessed fees against the Fund. The Appeals Board finds that penalty proceedings initiated to collect those benefits that are due and payable during the pendency of an appeal is a proceeding that falls within the definition of K.S.A. 44-536(g) as being subsequent to the ultimate disposition of the initial claim. Notwithstanding the possibility that the initial award may be later modified as a result of the appeal, K.S.A. 44-551(b) and K.S.A. 44-556(b) specifically provide that certain benefits are payable during appeal to both the Appeals Board and appellate courts. The parties cannot stay those payments.

The Appeals Board also finds that a proceeding for penalties under K.S.A. 44-512a is a proceeding that falls within the broad scope and application of K.S.A. 44-536(g) as a proceeding brought "otherwise". The Appeals Board rejects the Fund's contention that K.S.A. 44-536(g) provides that attorney fees are only payable in post-award requests for either review and modification or additional medical benefits. As quoted above, the statute applies to those post-award proceedings for "review and modification, a hearing for additional medical benefits, or otherwise." According to Webster's II New College Dictionary, the term "otherwise" has several meanings including "different from that or those specified or implied." Use of that term widely broadens rather than restricts the scope and application of K.S.A. 44-536(g).

Claimant requested additional attorney fees for services rendered on this appeal. Because the parties could not stipulate to the amount of a reasonable fee for those services and because the Appeals Board is limited to the review of questions of law and fact presented to the Administrative Law Judge, claimant is directed to present his request for additional attorney fees to the Administrative Law Judge.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order and Order Nunc Pro Tunc dated July 18, 1996, and July 22, 1996, respectively, entered by Special Administrative Law Judge Michael Harris should be, and hereby are, affirmed.

IT IS SO ORDERED.

Dated this ____ day of January 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James A. Cline, Wichita, KS
Darla J. Lilley, Wichita, KS
E. Thomas Pyle, III, Hutchinson, KS
Office of Administrative Law Judge, Wichita, KS
Michael Harris, Special Administrative Law Judge
Philip S. Harness, Director